



Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** American President Lines, Ltd.

**File:** B-259440

**Date:** December 20, 1994

I, Michael Greenberger, Esq., Robert T. Basseches, Esq., and Martha Hirschfield, Esq., Shea & Gardner, for the protester. Edward L. Merrigan, Esq., Jones, Walker, Waechter, Poitevent, Carrere & Denegre, for Waterman Steamship Corp., an interested party.

Leonard R. Kreitzberg, Esq., Department of Agriculture, for the agency.

Christine F. Davis, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

The General Accounting Office lacks jurisdiction to decide a protest by an ocean freight carrier against awards of contracts for agricultural commodities for export distribution, even though the agency solicited quotes from ocean carriers under the commodity solicitation and depended in part on those quotes to require delivery of the commodities to a particular United States port which the ocean freight carrier does not serve, because the quotes obtained for ocean freight services under the commodity solicitation do not result in a contract with the agency.

### DECISION

American President Lines, Ltd. (APL) protests the disqualification of its quotes for ocean freight services submitted under invitation for bids (IFB) No. 114, issued by the Department of Agriculture, Commodity Credit Corporation (CCC), for the acquisition of agricultural commodities for export distribution by third party organizations.

We dismiss the protest.

CCC issued IFB No. 114 for the procurement of various agricultural commodities in connection with Title II of the Agricultural Trade Development and Assistance Act of 1954 (Title II), 7 U.S.C. § 1721 et seq. (Supp. V 1993). Title II of the Act authorizes the United States to donate agricultural commodities abroad to relieve famine or other urgent or extraordinary conditions, to combat malnutrition, and to promote economic and community development. 7 U.S.C. § 1721. The Agency for International Development (AID)

administers the donation and use of Title II commodities, Id.; Exec. Order No. 12,752, 56 Fed. Reg. 8,255 (1991). AID donates commodities through agreements reached with a "cooperating sponsor," which may be a foreign government; a private non-profit organization; a private cooperative; or an intergovernmental organization, such as the World Food Program. 7 U.S.C. § 1722; 22 C.F.R. § 211.2(d) (1994). CCC is responsible for acquiring the commodities to be donated. 7 U.S.C. §§ 1726a(d), 1736(a).

CCC has established a regulatory framework for procuring Title II commodities. Upon receiving a procurement request from AID, CCC issues an IFB for the purchase of the specified commodities. 7 C.F.R. § 1496.4 (1994). By regulation, the low bid for a quantity of Title II commodities is the one that will result in "the lowest landed cost," meaning the combined cost of purchasing and transporting the goods to their overseas port of discharge. 7 C.F.R. §§ 1496.3(f), 1496.5(a). Thus, CCC develops a body of ocean freight information for each commodity procurement, 7 C.F.R. § 1496.5(b),<sup>1</sup> and uses the rate of a specific ocean carrier in selecting a commodities contractor, known as "the guideline rate," thereby determining the port of origin to which the commodities contractor must deliver the commodities. See 7 C.F.R. § 1496.1.

In selecting the guideline rate for a commodities award, CCC must reference the Cargo Preference Act of 1954 and the implementing regulations issued by the Maritime Administration (MarAd), which apply to commodities exported under the Title II Program. 46 U.S.C. App. § 1241f(b) (1988). In general, these laws require that United States (U.S.)-flag commercial vessels transport at least 75 percent of the gross tonnage of the Title II commodities, to the extent such vessels are available at fair and reasonable rates. 46 U.S.C. App. §§ 1241(b)(1); 1241f(a)(1). Accordingly, CCC uses U.S.-flag ship rates in computing the lowest landed cost for that portion of commodities necessary to satisfy the cargo preference laws. 7 C.F.R. § 1496.5(a).

Once the commodities arrive at the U.S. port designated by CCC, title passes to the cooperating sponsor, which accepts all subsequent expenses and responsibilities associated with

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<sup>1</sup>CCC obtains this information before bid opening by consulting a variety of sources, e.g., by obtaining separate ocean transportation quotes in response to the solicitation for commodities, by contacting the ocean freight carriers directly, or by reviewing published ocean tariffs, trade journals, and port and steamship publications. See 7 C.F.R. § 1496.5(b).

their transportation, unless waived by AID. 22 C.F.R. § 211.4(b)(1)(i), (b)(2), (b)(3), (c)(3). Cooperating sponsors must "make the necessary arrangements to accept commodities at the points of availability designated by CCC." 22 C.F.R. § 211.4(b)(2). Also, cooperating sponsors must initiate shipping requests for the exportation of the commodities, subject to AID's approval. 22 C.F.R. § 211.4(e)(2). Ocean transportation services are booked by a booking agent representing the cooperating sponsor, who must send CCC applicable bills of lading designating, among other things, the ocean freight carrier, at the time the commodities are exported. Id.

The IFB in this case "invite[d] offers . . . to sell to CCC the approximate quantities of . . . products for use in export programs," including, among other things, bulgur wheat and corn-soy blend, in approximate quantities of metric tons. Bidders could submit prices for any of the commodities on the bid schedule, and were to identify one or more U.S. ports where it would deliver the commodities. Under the IFB, CCC reserved the right to reject a bid that only offered delivery to ports on a single coastal range (East Coast, West Coast, or Gulf Coast ports), thereby encouraging alternate delivery terms. CCC considered each bid for commodities, in connection with the ocean transportation information it gathered, to determine which combination of goods and ocean transportation services would result in the "lowest landed cost." Based upon this combination, CCC awarded contracts for commodities, each to be delivered to a designated U.S. port. See 7 C.F.R. §§ 1496.1; 1496.5(a).

The IFB here also invited ocean freight carriers to provide rate information for the transportation of specified food products from U.S. ports to various foreign ports of discharge. CCC requested such rate information by October 31, 1994, one week in advance of the November 7 bid opening. CCC described the practice it follows in a trade notice issued to ocean freight carriers, issued June 2, 1994:

"The use of a specific freight rate in determining commodity vendor awards does not constitute a contract with that carrier. However, the ocean rates used in the evaluation are given to the designated booking agent for use in making ocean transportation bookings."

In practice, after CCC furnishes the "guideline" rate to the booking agent, the booking agent solicits bids from ocean carriers serving the designated U.S. port. The booking agent discloses the guideline rate to the bidders and allows them an opportunity to submit a lower bid for transporting

the same commodities from the same port. The booking agent is "instructed" by CCC to select an ocean carrier whose rates are equal to or lower than the guideline rate and whose carriage will qualify for a U.S. cargo preference, if CCC has so allocated the cargo in its award determination.<sup>2</sup>

In response to the IFB request, APL submitted shipping rates to transport a portion of the commodities to be procured, bulgur wheat and corn-soy blend, from ports in the West Coast to ports in India. Waterman Steamship Corp. submitted shipping rates to transport these same commodities from the West Coast to India (like APL), and from the Gulf Coast to India. To achieve cargo preference goals, CCC allocated the bulgur wheat and corn-soy blend for U.S.-flag ship exportation and used U.S.-flag ship rates in its lowest landed cost analysis. CCC ultimately awarded contracts for these commodities based upon Waterman's Gulf Coast rates. While APL's West Coast rates apparently would have yielded a lower landed cost for these commodities than Waterman's Gulf Coast rates, CCC determined that APL's West Coast service did not qualify as U.S.-flag ship service because of Waterman's offered West Coast service, based upon a MarAd prioritization rule.<sup>3</sup> Accordingly, CCC procured the bulgur wheat and corn-soy blend for delivery to designated Gulf Coast ports, which APL does not service. This protest followed.

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<sup>2</sup>AID regulations provide that the United States will only finance ocean transportation up to rates used in the lowest landed cost analysis. See 22 C.F.R. § 211.4(c)(2).

<sup>3</sup>Specifically, APL's West Coast carrier service switches from a U.S.-flag ship to a foreign-flag relay ship for the final segment of the voyage. MarAd has previously ruled that this type of service will qualify as U.S.-flag ship service, as long as there is no carrier that offers all-water, U.S.-flag ship service. Waterman recently initiated such all-water, U.S.-flag ship service in the West Coast, and CCC thereupon disqualified APL as a U.S.-flag ship carrier for these routes in evaluating its lowest landed cost options. We note that a dispute exists between CCC and MarAd regarding the interpretation of the prioritization rule and that Waterman requested an administrative hearing before MarAd to resolve this dispute. See 59 Fed. Reg. 38232 (1994). Namely, CCC previously considered APL's mixed-vessel West Coast service to qualify as U.S.-flag vessel service, until Waterman added its West Coast route, which APL asserts is a "sham" to cause its West Coast service to be disqualified. MarAd apparently found that APL's West Coast service should not be considered U.S.-flag service by virtue of Waterman's all-water, U.S.-flag ship service from the Gulf Coast.

APL basically protests that CCC improperly found Waterman to be a responsible carrier for the West Coast service for purposes of evaluating the ocean carrier quotes under the IFB, and that CCC should "award contracts for carriage of the challenged shipments to APL."

CCC and Waterman argue that our Office lacks jurisdiction to decide this protest because the IFB does not contemplate the award of transportation contracts, only commodities contracts, and that other parties, not CCC, contract for ocean transportation services under the Title II program.

APL responds that CCC will award both commodities and transportation contracts under the IFB in this case, noting that the IFB, on its face, is directed both to commodity suppliers and ocean carriers. The protester further notes that CCC's "lowest landed cost" evaluation results in the designation of a port of origin, which essentially defines the field of competitors for the eventual transportation contract. The protester claims, "on information and belief," that CCC will subsequently conduct a second round of bidding among this field of competitors--through a booking agent retained by CCC--and will make award to the low, responsible bidder. APL's arguments are predicated on a misunderstanding of the IFB and applicable regulations.

The IFB does not provide for the award of transportation contracts by CCC. The notice to ocean freight carriers contained in the IFB does not provide for award to those companies; state any evaluation criteria; request bidders' certifications, representations, or warranties; or establish any terms as the basis for a resulting contract. Reasonably construed, the IFB does not suggest that it will result in a transportation contract with CCC or any other government agency, but simply requests rate and related information from ocean freight carriers that CCC will use to select a commodity bidder and to designate a U.S. port for delivery of those commodities.

This interpretation of the IFB is entirely consistent with the regulatory framework in which CCC operates under the Title II program. The regulations only authorize CCC to issue solicitations for the procurement of commodities and do not provide for the procurement of ocean transportation for the commodities. 7 C.F.R. § 1496.4. Under the regulations, CCC, in evaluating bids for these commodities, is to be cognizant that the commodities will be exported,

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'APL argues, for example, that Waterman's West Coast service was not "available at fair and reasonable rates," and should not have operated to disqualify APL's West Coast service. See 46 U.S.C. App. § 1241(b)(1).

that the cargo preference laws will apply to these exports, and that the United States may reimburse the cooperating sponsor's ocean transportation expenses. All these considerations are encompassed by the "lowest landed cost" evaluation scheme for awarding commodities contracts. This evaluation does not result in the award of a transportation contract by CCC to the "guideline" carrier whose rate information is used to determine the lowest landed cost of a commodity; rather, the quotes obtained from ocean carriers in response to this IFB influenced the selection of a port for the delivery of the commodities, which is served by the "guideline" and possibly other carriers.

While the protester correctly observes that the designation of a particular port necessarily restricts the field of competitors for transportation services, this fact does not confer bid protest jurisdiction on our Office in this case unless CCC awards the transportation contract. Compare Kerr-McGee Chemical Corp.--Recon., B-252979.2, Aug. 25, 1993, 93-2 CPD ¶ 120, with Humco, Inc., B-244633, Nov. 6, 1991, 91-2 CPD ¶ 431, recon. denied, B-244633.2, Apr. 2, 1992, 92-1 CPD ¶ 339. In this regard, the Competition in Contracting Act of 1984 limits the jurisdiction of our Office to protests of federal agency procurements, and defines a "protest," in pertinent part, as a written objection to the proposed or actual award of a contract for property or services by the federal agency. 31 U.S.C. § 3551 (1988).

The protester contends that CCC is essentially designating the award because CCC selects the booking agent to conduct a second round of bidding on CCC's behalf, who awards a transportation contract to the low responsible bidder which serves the designated port. These contentions have no basis in fact or law. Once the commodities arrive at the U.S. port designated by CCC and the ocean carrier takes possession, title passes to the cooperating sponsor. 22 C.F.R. § 211.4(b)(1)(i). The cooperating sponsor, not CCC, must "make the necessary arrangements to accept commodities." 22 C.F.R. § 211.4(b)(2). In this regard, applicable regulations provide that the cooperating sponsor, not CCC, initiates all shipping requests, and an ocean carrier is procured by a "booking agent representing the cooperating sponsor." See 22 C.F.R. § 211.4(e)(2). The regulations do not provide that CCC will contract for ocean carriage of the commodities, nor do the regulations suggest that CCC will contract for the services of "the booking agent representing the cooperating sponsor." Although CCC reports that it will instruct the cooperating sponsors and their booking agents to contract from an eligible U.S.-flag vessel at a rate equal to or better than the rate used in the lowest landed cost evaluation, and applicable regulations provide that the booking agent is to apprise CCC

of which ocean carrier will carry the commodities, the regulations simply do not provide for CCC to contract with or reject this carrier. Thus, there is no basis to consider APL's argument that the booking agents are essentially government prime contractors who award transportation subcontracts "by or for" CCC. See 4 C.F.R. § 21.3(m)(10); St. Mary's Hosp. and Medical Center of San Francisco, CA, 70 Comp. Gen. 579 (1991), 91-1 CPD ¶ 597.

In sum, because CCC does not contract for ocean transportation services under the IFB in this case, we have no basis to consider APL's protest under our bid protest jurisdiction. See Richard S. Cohen, B-249131.2, Nov. 16, 1992, 92-2 CPD ¶ 348, recon. denied, B-249131.3, Feb. 2, 1993, 93-1 CPD ¶ 91 (where an agency obtains competitive offers, there is no bid protest jurisdiction if the offers do not lead to a contract with the agency).

The protest is dismissed.



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